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KATE SPADE & COMPANY

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

13 LAURA MARKS, GAYLIA PICKLES &
DONNA VANDIVER, individually and on
14 behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 KATE SPADE AND COMPANY, a Delaware
corporation; and DOES 1-50, inclusive,

18 Defendant.
19
20
21

Case No. 3:15-cv-05329-VC

The Hon. Vince Chhabria

**DEFENDANT KATE SPADE &
COMPANY'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS' EX
PARTE MOTION FOR MODIFICATION
OF THE BRIEFING SCHEDULE ON
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Complaint Filed: November 29, 2015
Trial Date: None Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs' *Ex Parte* Motion For Modification Of The Briefing Schedule On Plaintiffs'
4 Motion For Class Certification ("*Ex Parte* Motion") is a procedurally improper, eleventh-hour
5 attempt to escape the consequences of Plaintiffs' failure to move this case forward to be in a
6 position to file a motion for class certification by the April 28, 2017 deadline set by the Court in
7 its September 27, 2016 scheduling order (Dkt. No. 77) – *nearly six months ago*. At no time since
8 then have Plaintiffs suggested a modification of the briefing schedule set by the Court. Rather, the
9 issue was not raised by Plaintiffs until Monday, April 24, 2017, a *mere four days* before the
10 deadline for Plaintiffs to file their class certification motion.

11 While Plaintiffs attempt to blame their claimed inability to comply with the Court's
12 scheduling order on a simple calendaring mistake, Plaintiffs' explanations do not pass the
13 proverbial "smell test." Rather, the real reason that Plaintiffs' *Ex Parte* Motion is being made is
14 because Plaintiffs have taken virtually *no action* in this case since the September 27, 2016
15 scheduling conference. No discovery been served by Plaintiffs since September 2016. And, while
16 Plaintiffs appear to suggest that Kate Spade's discovery responses are the reason for Plaintiffs'
17 delays, those responses were served in December 2016 and Plaintiffs have never even met and
18 conferred with Kate Spade over any alleged deficiencies therein. Nor have Plaintiffs noticed the
19 depositions of any of Kate Spade's witnesses. Clearly, any attempt by Plaintiffs to blame Kate
20 Spade for their failure to prepare their certification motion is specious

21 Not only have Plaintiffs failed to establish good cause for modifying the Court's
22 scheduling order, the requested modification would *substantially prejudice* Kate Spade. *First*, as
23 counsel for Kate Spade has already told Plaintiffs, lead counsel for Kate Spade has a pre-planned
24 family vacation scheduled for the last two weeks of August and will be out of the country and
25 unavailable during that time. It would substantially prejudice Kate Spade if it were forced to
26 prepare and file its opposition to a motion for class certification on August 24, 2017, while its lead
27 counsel was unavailable. *Second*, given Plaintiffs' inaction in this case over the last six months,
28 the requested continuance will mean that Plaintiffs will be conducting *virtually all* of the

1 discovery and depositions relating to complex class certification issues in the next thirty
2 days. Even assuming that this can be accomplished (given the time permitted for discovery
3 responses and the availability of what will likely be multiple Rule 30(b)(6) witnesses), it will
4 nevertheless be extremely inconvenient and burdensome for Kate Spade and its witnesses.

5 For the reasons set forth herein, Plaintiffs' *Ex Parte* Motion should be denied.

6 **II. PLAINTIFFS' EX PARTE MOTION SHOULD BE DENIED**

7 **A. Plaintiffs' Ex Parte Motion Is Procedurally Improper**

8 As an initial matter, Plaintiffs' *Ex Parte* Motion should be denied because it is
9 procedurally improper. Northern District of California Local Rule 7-10 governs the filing of *ex*
10 *parte* motions.¹ It provides that an *ex parte* motion can be filed only if "a statute, Federal Rule,
11 local rule or Standing Order" authorizes its filing. Local Rule 7-10 also specifies that the motion
12 must include "a citation to the statute, rule or order which permits the use of an *ex parte* motion to
13 obtain the relief sought." Plaintiffs' present motion fails to provide the required citation – because
14 there is no statute, Federal Rule, local rule, or Standing Order that authorizes the filing of an *ex*
15 *parte* motion in these circumstances. In fact, Local Rule 6-3 expressly provides that the party
16 opposing a motion to enlarge time shall be given **four days** to file its Opposition. *See* N.D. Civ.
17 Local Rule 6-3(b).² Hence, the local rules clearly provide that Plaintiffs were required to file an
18 Administrative Motion – which they failed to do. For this reason alone, Plaintiffs' procedurally
19 improper *Ex Parte* Motion should be summarily denied.

20 **B. Plaintiffs Have Not Established Good Cause For A Modification Of The Class**
21 **Certification Briefing Schedule**

22 In order to obtain a modification of a scheduling order, the moving party must establish
23 good cause. *See* Fed. R. Civ. Proc. 16(b)(4). "If the Party seeking the modification 'was not
24 diligent, the inquiry should end' and the motion to modify should not be granted." *Zivkovic v.*

25 _____
26 ¹ Although Plaintiffs contend that their *Ex Parte* Motion is authorized under "Civil Local Rule 7-
10(b)", that is not the case. Indeed, ***the United States District Court Northern District of***
27 ***California Civil Local Rules do not contain a "Rule 7-10(b)."***

28 ² The only authority cited in Plaintiffs' *Ex Parte* motion (other than the non-existence Local Rule
7-10(b)) is Paragraph 8 of Judge Vince Chhabria's Standing Order for Civil Cases. However, that
paragraph does not authorize the filing of an *ex parte* motion to enlarge time under Local Rule 6-3.

1 *Southwest California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Here, Plaintiffs’ conduct
2 in this case is the antithesis of diligence; Plaintiffs’ *Ex Parte* Motion must therefore be denied.

3 Although Plaintiffs argue that their failure to prepare their motion was the result of a
4 simple calendaring mistake, Plaintiffs’ explanations strain credulity. The *Ex Parte* Motion asserts
5 a single associate from the Markum Susman firm “was unaware of the exact date for the filing of
6 Plaintiffs’ class certification motion that had been set in a Minute Order that he did not see.” [*Ex*
7 *Parte* Motion p. 3:18-23.] But, that ignores the fact that the Minute Entry setting for the
8 scheduling order on the certification motion was ***emailed to all of Plaintiffs’ attorneys*** in this case
9 – ***five attorneys*** from the Markum Susman firm (counsel for Plaintiffs Marks and Pickles) and ***two***
10 ***attorneys*** from the Williamson Law Firm (counsel for Plaintiff Vandiver). [*See* Cardon Decl. ¶ 6;
11 Ex. B (Notice of Electronic Filing).] Even more troublesome, three of Plaintiffs’ attorneys –
12 including the associate that claims to not have known about the deadline – ***were present*** at the
13 September 27, 2017 further case management conference, during which the parties discussed the
14 briefing schedule and the Court set the scheduling order. [*See* Dkt. No. 71 (noting the presence of
15 attorneys Mark Ozzello and Ari Bassar for Plaintiff Pickles and Che Williamson for Plaintiff).]
16 And, of course, Plaintiffs’ deadline for filing its class certification motion cannot be of any
17 surprise to any of Plaintiffs’ eight attorneys of record; after all, it was the deadline that the parties’
18 agreed to and ***jointly proposed*** in their Updated Joint Case Management Statement. [*See* Dkt. No.
19 70 (Updated Joint Case Management Statement at p. 9:4-6).]

20 Plaintiffs’ failure to comply with the Court’s scheduling order is not the result of any
21 excusable “calendaring mistake” and any suggestion to the contrary to simply a smokescreen
22 designed to mask Plaintiffs’ failure move their case forward. This action was filed in November
23 2015. Yet, Plaintiffs have taken ***virtually no action*** to move their case forward. The ***only***
24 discovery that Plaintiffs have served in this action is a single set of document requests, served by
25 Plaintiff Marks the day of the further case management conference. Kate Spade served its
26 responses to that discovery on December 13, 2016 – ***over four months ago***. Yet, Plaintiff Marks
27 has not even met and conferred with Kate Spade over any alleged deficiencies in Kate Spade’s
28 responses as required under Local Rule 37-1, much less sought any relief from the Court. Nor has

1 any additional discovery been served since September 2016; nor have Plaintiffs' counsel
2 mentioned Kate Spade's document production in any email since February; nor have Plaintiffs
3 taken any steps to depose any of Kate Spade Spade's witnesses or ascertain their availability for
4 deposition. [Cardon Decl. ¶ 4-5.]³

5 In sum, Plaintiffs have not come close to meeting their burden of establishing good cause
6 and diligence to justify modifying the Court's scheduling order on the class certification briefing
7 schedule.⁴ Simply put, Plaintiffs have failed to move their case forward without justification. *See*
8 *Zivkovic*, 302 F.3d at 1087 (motion to amend scheduling order properly denied where plaintiff did
9 not show diligence in complying with dates and waited four months before seeking relief). Nor
10 have Plaintiffs provided any justification for waiting until a *mere four days* before the certification
11 motion deadline – which all of their eight attorneys (from two firms) had notice of – to request a
12 continuance of the class certification deadline. *See Mission Power Engineering Co. v. Continental*
13 *Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995) (“Ex parte applications are not intended to save
14 the day for parties who have failed to present requests when they should have...”).

15 **C. Plaintiffs' Requested Modification Of The Court's Scheduling Order Would**
16 **Substantially Prejudice Kate Spade**

17 Plaintiffs' *Ex Parte* Motion should also be denied because the modified briefing schedule
18 requested by Plaintiffs would materially prejudice Kate Spade. Lead counsel for Kate Spade,
19 Craig Cardon, has a pre-planned family vacation and will be out of the country the last two weeks
20 of August and unavailable during that time. [Cardon Decl. ¶ 3.] It goes without saying that Kate
21 Spade would be unfairly prejudiced if it was forced to prepare and file its opposition to a class
22 certification motion in a case seeking tens of millions of dollars in damages (if not more) while its
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25 ³ Nor have Plaintiffs provided Kate Spade with supplemental responses to Kate Spade's discovery
26 (document requests and special interrogatories) and authority supporting Plaintiffs' privilege and
work product objections, which Plaintiffs' counsel promised to provide. Plaintiffs' counsel has
ignored Kate Spade's follow up requests for that information.

27 ⁴ Plaintiffs claim, without any elaboration, that granting a continuance “is in the interests of the
28 putative classes” (Ex Parte Motion, p. 2:9-10); but, that puts the cart before the horse and
incorrectly assumes that a class could ever be certified.

1 lead counsel is unavailable.⁵

2 Moreover, as discussed above, Plaintiffs' inability to meet their motion deadline is not the
3 result of any excusable "calendaring mistake" whereby Plaintiffs simply need more time to draft
4 their motion. Rather, given Plaintiffs' near complete inactivity over the last six months, the
5 requested continuance would mean that Plaintiffs would be conducting *virtually all* of the
6 discovery and depositions relating to complex class certification issues in the next thirty
7 days. Even assuming that this can be accomplished (given the time permitted for discovery
8 responses and the availability of what will likely be multiple Rule 30(b)(6) witnesses), it will
9 nevertheless be extremely inconvenient and burdensome for Kate Spade and its witnesses. Again,
10 these are issues that likely could have been worked out had Plaintiffs raised the issue of modifying
11 the class certification briefing schedule prior to four days before the deadline to file their motion.
12 Kate Spade should not be made to shoulder the consequences of Plaintiffs' delay.⁶

13 **III. CONCLUSION**

14 Kate Spade respectfully requests that the Court deny Plaintiffs' *Ex Parte* Motion.

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19 ⁵ Kate Spade would be equally prejudiced if it were forced to respond to Plaintiffs' class
20 certification motion in less than the agreed-upon 90 days set forth in the Court's September 27,
21 2016 scheduling order, which contemplated that the bulk of the discovery (including expert
discovery) necessary for Kate Spade to respond to Plaintiffs' arguments would be conducted after
Kate Spade received Plaintiffs' moving papers. [See e.g., Dkt. No. 70 (Updated Joint Case
Management Statement, p. 9:6-9).]

22 ⁶ Plaintiffs relegate the issue of prejudice to a single sentence in their *Ex Parte* Motion, stating in
23 conclusory fashion that the modified briefing schedule "will not...prejudice the Defendant."
24 Notably, the *Ex Parte* Motion fails to inform the Court that Kate Spade had advised Plaintiffs that
its lead counsel had a scheduling conflict with the proposed briefing schedule that would, in fact,
cause Kate Spade severe prejudice. [Cardon Decl. ¶ 3; Ex. A.] Curiously, Plaintiffs initially
25 submitted an incomplete email chain as Exhibit D to the Bassier Declaration, which omitted the
26 page of the email chain that contained Kate Spade's objections to the briefing schedule and
description of the prejudice that the schedule would cause Kate Spade. And, while Plaintiffs filed
a Notice of Errata attaching an amended declaration and a complete version of the email chain, the
27 Notice of Errata falsely claims that Plaintiffs offered to accommodate Mr. Cardon's scheduling
conflict. That is not true. Counsel for Kate Spade notified Plaintiffs' counsel of Mr. Cardon's
28 scheduling conflict in an email on April 25, 2017. [*Id.*] There were no subsequent offers or
proposals made by Plaintiffs to address Mr. Cardon's scheduling conflict. [*Id.*]

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By

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